

DRAFT CONCEPT PAPER
FOR
THE CORPS OF ENGINEERS REGULATORY PROGRAM ALTERNATE
PROCEDURES FOR PROTECTION OF HISTORIC PROPERTIES AS
PROVIDED FOR UNDER 36 CFR 800.14

1. Definitions

a. "Certified local government" means a local government certified in accordance with section 101(c)(1) of the National Historic Preservation Act (see 36 CFR part 61).

b. "Consultation" means the process of seeking, discussing, and considering the views of participants, and, where feasible, seeking agreement with them regarding matters which arise during the section 106 process. The Secretary's "Standards and Guidelines for Federal Agency Preservation Programs pursuant to the National Historic Preservation Act" provides further guidance on consultation. (See also government-to-government consultation with Federally-recognized tribes, as discussed below.)

c. "Council" means the Advisory Council on Historic Preservation or a Council member or employee designated to act on behalf of the Council.

d. "Day or days" means calendar days.

e. "District Engineer" (DE) means the Federal agency official for the purposes of implementing section 106 of the National Historic Preservation Act, in the context of the Corps Regulatory Program (Corps), or the DE's designee.

f. "Effect" means alteration to the characteristics of a historic property qualifying it for inclusion or eligibility for, the National Register of Historic Places. The criteria for "effect" and "adverse effect" are described in the "Assessing Effect" section of these procedures (part 9).

g. The term "eligible for inclusion in the National Register" means both properties formally determined as such in accordance with the regulations of the Secretary of the Interior and all other properties that meet the National Register criteria.

h. "Federal trust responsibility" means the unique legal relationship between the Federal government and Federally recognized tribes arising from treaties between the government and a tribe in which the tribe ceded land to the United States in exchange for protection, to the highest degree possible of reservation lands, trust resources, off-reservation treaty rights, properties of traditional religious and/or cultural importance to Indian tribes (e.g., sacred sites

and traditional cultural properties) when such lands and properties may be affected by the Corps, in accordance with provisions and principles within the Constitution, and by provisions in treaties, laws statutes, policies, and Executive Orders.

i. "Government-to-Government Consultation," means a process formally established and agreed on by the Corps and an Indian Tribe or Tribes through their respective governmental structures for the purposes of: establishing relationships and developing processes by which information regarding proposed permit actions may be exchanged; identifying and discussing concerns associated with proposed permit actions; exploring options and identifying alternatives to avoid, minimize or mitigate for effects to properties of traditional religious and or cultural importance; and, coordinating agency decisions on permit applications.

j. "Historic Property" means any prehistoric or historic district, site, building, structures, or object, included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. This term also includes cultural properties and sacred sites that meet the National Register Criteria. (see especially 36 CFR 60.3 and 60.4)

k. "Indian tribe" means a Federally-recognized Indian tribe, band, nation, pueblo, village, or community, including Alaska native village, regional corporation, or village corporation that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to Public Law No. 103-454, 108 Stat. 4791, and "Indian" refers to a member for such Indian tribe.

l. "Keeper of the National Register" means the Department of the Interior official who manages listings in the National Register of Historic Places (both nominations and determinations of eligibility) and who resolves disputes on a property's eligibility.

m. "Memorandum of Agreement" (MOA) means the document that records the terms and conditions agreed upon to resolve adverse effects of an undertaking upon historic properties.

n. "National Historic Landmark" (NHL) means an historic property listed in the National Register by the Secretary of Interior that is of national importance. The National Park Service must be consulted if there is a potential effect to an NHL.

o. "National Register" means the National Register of Historic Places maintained by the Secretary of the Interior. The list consists of Eligible, or listed, districts, buildings, structures, objects, and sites, including traditional cultural properties and sacred sites.

p. "Native Hawaiian" means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the areas that now constitute the State of Hawaii.

q. "Native Hawaiian Organization" (NHO) means any organization which serves and represents the interests of Native Hawaiians; has a primary and stated purpose the provision of services to Native Hawaiians; and has demonstrated expertise in aspects of historic preservation that are significant to Native Hawaiians.

r. "Programmatic agreement" (PA) means a document that records the terms and conditions agreed upon to resolve the potential adverse effects of a complex permit action, including a Regional General Permit or a Nationwide Permit, if necessary, or complex permitting situations.

s. "Special Condition" for these procedures means an enforceable condition of a Department of the Army (DA) Permit that can be incorporated into a permit authorization to resolve effects that may occur as a result of the authorized undertaking.

t. "State Historic Preservation Officer" (SHPO) means the official appointed or designated pursuant to section 101(b)(1) of the National Historic Preservation Act to administer the State historic preservation program or a representative designated to act for the State historic preservation officer.

u. "Tribal Historic Preservation Officer" (THPO) means the tribal official appointed by the tribe's chief governing authority or designated by a tribal ordinance or preservation program who has assumed the responsibilities of the SHPO for purposes of section 106 compliance on tribal lands in accordance with section 101(d)(2) of the National Historic Preservation Act.

v. "Tribal lands" means all lands within the exterior boundaries of any Indian reservation, allotted lands owned by Indians, and all dependent Indian communities (see 18 USC, Sec. 1151).

w. "Undertaking", means, for the purposes of these procedures, the activity that requires a DA permit pursuant to the Corps regulations at 33 CFR 320-331. The undertaking also includes any associated activities over which the DE has sufficient control and responsibility to warrant Federal review. When determining the degree of Corps regulatory control, consider the type of Corps

regulatory involvement or link to the overall project, and whether or not the overall project could move forward without a DA permit. Work that is required of the applicant as part of a permit condition is also part of the undertaking (i.e. mitigation sites). The DE as the "agency official" is solely responsible for defining the undertaking within the Regulatory process.

2. General Policies

The objective of the Regulatory Program is to provide fair and timely decisions whenever a member of the public, Federal agency, Tribal government, or state or local government submits an application to discharge fill in waters of the US, including certain wetlands, under the authority of Section 404 of the Clean Water Act of 1972 (CWA), or to work and/or place a structure in navigable waterways under Section 10 of the Rivers Harbors Act of 1899 (RHA).

a. Regulations for processing permit applications under both authorities are found at 33 CFR 320-331. By regulation and policy, permit applicants must consider avoidance and minimization of impacts to aquatic resources, including wetlands, before compensating for unavoidable impacts. This same philosophy is applied when considering historic properties. Corps staff will work with applicants and consulting parties to avoid and minimize effects to historic properties first, before authorizing activities requiring mitigation (e.g., data recovery, recording).

b. Under its authorities, the Corps regulates activities affecting waters of the United States (WOUS) on private property, trust lands, or land under the management and jurisdiction of other governmental entities. The RHA and CWA envision that economic development activities would occur; hence these statutes and their implementing regulations establish a process for the Corps to evaluate project proposals, and authorize those where impacts to aquatic resources are not contrary to the overall public interest, or in the case of general permits, where impacts to aquatic resources are no more than minimal, with mitigation. Corps regulatory staff must be cognizant of private property rights and responsibilities when exercising federal control over activities on lands of others, including historic properties they are on.

c. It is the policy of Army Civil Works to work effectively with tribal governments, landowners, resource agencies, historic preservation organizations, stakeholders, and the public to comply with the NHPA and other historic preservation laws and regulations, Executive Orders, Presidential Memoranda, and policy guidance documents, as appropriate, and to efficiently process permit applications so that development projects can proceed for the good of the Nation's economic health and national security.

1. *National Historic Landmarks.* The DE will take into account the effects, if any, of proposed undertakings on historic properties both within and

beyond the waters of the United States. Pursuant to section 110(f) of the NHPA, the DE, where the undertaking that is the subject of a permit action may directly and adversely affect any National Historic Landmark, shall, to the maximum extent possible, condition any issued permit as may be necessary to minimize harm to such landmark.

2. *Public interest review.* In addition to the requirements of the NHPA, all historic properties are subject to consideration under the National Environmental Policy Act (33 CFR part 325, appendix B) and the Corps' public interest review requirements contained in 33 CFR 320.4. Therefore, effects to historic properties and other historic resources will be considered by DE's a when making permit decisions.
3. *Regulatory scope of analysis.* DEs are responsible for making final determinations regarding the boundaries of RSAs; however, they are encouraged to seek the views of the SHPO/THPOs or their staff before establishing RSAs.
 - (i) The Regulatory scope of analysis (RSA) is influenced by the scope, scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking. For the Army Civil Works Regulatory Program, the RSA specifically includes jurisdictional waters of the United States, and may also include directly associated upland areas or buffers as determined by the DE, focusing on the specific activity requiring a DA permit.
 - (ii) DEs must be able to document sufficient regulatory control and responsibility to warrant Federal review on whatever RSA is defined on private or non-Corps government property. The DE may identify relatively limited RSAs for activities authorized under general permits, activities which by law and regulation have no more than minimal effects.
 - (iii) Generally the establishment of the RSA will follow the scope of analysis as defined in 33 CFR Part 325, Appendix B- *NEPA Implementation Procedures for the Regulatory Program*. The following four criteria will be used to identify those components of an overall project that constitute the undertaking, for the purposes of this alternative procedure, to define the RSA: 1) whether or not the regulated activity comprises merely a component of a larger project (e.g. the construction of a pier in a navigable water associated with the construction of an oil refinery on an upland area); 2) whether there are aspects of an associated upland facility in the immediate vicinity of the regulated activity which affect the location and configuration of the activity regulated by the Corps; 3) the extent to which the entire project will be within

Corps jurisdiction; and 4) the extent of cumulative involvement of the Corps and other Federal agencies.

4. *Lead Federal agency.* The Corps will be the lead Federal Agency for actions requiring authorization under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act where there is no other federal involvement. For these actions, the Corps permit or verification will be the sole Federal decision. However, if more than one Federal agency is involved in an undertaking, the DE may choose to support another Federal agency as the lead Federal agency or serve as a cooperating agency, to achieve efficient permit evaluation, minimize redundancy, and provide effective lines of coordination and consultation. Hence, Corps regulatory staff may use lead Federal agency processes, procedures, and work products, including NEPA work, and the results of consultation with tribal governments, when evaluating permit applications and making permit decisions. DEs will, as required by law and regulation, make their own independent permit decisions, but look for opportunities to integrate processes for the benefit of the regulatory program and achieving Tribal consultation and historic preservation goals. DEs may accept documentation for Federal or Federally-assisted projects from a lead Federal agency and use them, as appropriate, to comply with the requirements of the NHPA within the context of the Regulatory Program.
5. *National Environmental Policy Act (NEPA) process.* The NEPA process is generally not a substitute for the Section 106 process, however, compliance with Section 106 of the NHPA can be accomplished in conjunction with the NEPA process. Consulting parties, such as the SHPO or THPO, should be provided the opportunity to participate early in the NEPA process. The environmental assessment and finding of no significant impact (FONSI), or environmental impact statement and record of decision (ROD), must include the appropriate scoping, assessment of effects, and any consultation leading to resolution of adverse effects. If the proposed undertaking will result in adverse effects on historic properties that are listed or eligible for inclusion in the National Register of Historic Places, a binding commitment identifying measures to avoid, minimize or mitigate such effects will be incorporated into the FONSI or ROD or an MOA may be executed. The DE may use the process and documentation required for the preparation of an Environmental Impact Statement (EIS) and Record of Decision (ROD) in lieu of these procedures, if the DE has notified the SHPO/THPO and the Council in advance that he intends to do so and the standards of 36 CFR 800.8 (c)(1)-(5) are met.

6. *Consultation with Indian Tribes and NHOs.* If a proposed activity has the potential to affect historic properties to which Indian Tribes and NHOs attach religious and cultural significance, the DE will contact the Indian Tribe(s) and NHOs in a manner appropriate for pre-decisional government-to-government consultation. Public notices alone are insufficient means to initiate and accomplish consultation. An effective consultation process requires active communication with Indian Tribes and NHOs, considering their interests during the decision-making process in recognition of their sovereign status.
7. *Corps permitting process.* These procedures are intended to ensure the full consideration of historic properties during the processing and evaluation of standard permit applications (including Letters of Permission), and requests for general permit verifications (including nationwide, regional and programmatic general permits), within the jurisdictional and time constraints of the Corps Regulatory Program. In accordance with applicable laws, executive orders, and regulations, the Corps will consult with SHPOs/THPOs, Indian tribes, NHOs, other consulting parties, the public and, where applicable, the Council during the permit process and prior to making a decision whether to grant a permit authorization. In addition, the Corps will identify and consult formally with those Tribal governments that have an interest in the undertaking pursuant to the Federal trust responsibility.
8. *Documentation.* DEs will ensure that a determination, finding, MOA, or PA made under these procedures is supported by documentation to enable interested parties to understand the basis for the action. Such documentation shall be provided to the Council, SHPOs, THPOs, and Tribes to the extent permitted by law.
9. *Use of Subject Matter Experts.* DEs should, as appropriate, consult with qualified in house cultural resources staff when implementing these procedures.
10. *Use of Applicants/Consultants.* The DE may recommend that permit applicants or their authorized representatives initiate consultation with the SHPO/THPO and other consulting parties. The DE will notify the SHPO/THPO when a permit applicant or group of permit applicants has been authorized to initiate consultation. In such circumstances, the DE remains responsible for all findings and determinations made pursuant to consultation under section 106 of the NHPA, as well as government-to-government relationships with Indian tribes.
11. *Avoidance and minimization.* At any time during permit processing, the DE may consult with applicants, SHPO/THPO's, Indian Tribes and NHOs, and other consulting parties to discuss and consider possible

alternatives or measures to avoid or minimize the potential adverse effects of a proposed undertaking on historic properties.

3. Pre-Application Consultations

If during a pre-application consultation, the DE believes that a historic property may be affected by a proposed undertaking, he will inform the prospective applicant that prior to authorizing said activity the Corps must comply with the National Historic Preservation Act and apply the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation. DEs also will inform prospective permit applicants that the Corps will consider any effects on historic properties in accordance with these procedures when evaluating a proposed undertaking.

a. As a general rule, the Corps encourages prospective applicants to engage early and often during the planning phase of a proposed undertaking; however, pre-application consultation is not required to obtain a DA permit. If a prospective applicant requests pre-application consultation, the Corps will make every effort to accommodate such requests, to the extent permitted by law and within available resources.

b. During pre-application consultations with prospective permit applicants DEs will encourage the consideration of possible effects to historic properties at the earliest practical time in their planning process. Such pre-application consultations should, if appropriate, involve consideration of alternatives that avoid and minimize the undertaking's adverse effects on historic properties. If,

4. Initial Review

a. Establish undertaking. Upon receipt of a permit application for Standard Individual Permit or a General Permit (including pre-construction notifications for Nationwide Permits) verification request, the Corps will determine whether a proposed action is an undertaking, as defined in Section 1 of these procedures, and, if so, whether it is a type of activity that has the potential to cause effects on historic properties.

b. Determine if Project Needs Further Review. Every five years, or less, as required by statute, general permits must be reevaluated and reissued. As part of this reissue process the Office of Management and Budget, interested Federal agencies (including the Council), tribes, and the public have an opportunity to provide input on general permits being proposed, and to comment programmatically on their potential to affect historic properties. As part of this programmatic review general permits may be identified which have little or no potential to affect historic properties. In such cases, after coordination with the Council, no further case-by-case review may be required. Reference Appendix {UNDER DEVELOPMENT} for a list of such activities. In addition, DEs may

consult with the SHPO/THPO and identify additional categories of activities that have no potential to cause effects.

c. Determine Regulatory Scope of Analysis. DEs will define the RSA within which historic properties will be considered. DEs may seek the views of the SHPO/THPO before making the final determination.

d. Identify historic properties within the RSA. The DE may obtain information from the SHPO/THPO, Indian tribes, NHOs, and other appropriate sources, such as district files and records, the latest published version of the National Register, and other lists of properties determined eligible, to determine if there are any historic properties that may be affected by the proposed undertaking. Such procedures shall be accomplished within the time limits specified in these procedures and the Corps Regulations found at 33 CFR part 325, Appendix B and 33 CFR 330.4(g). In-house expertise should be utilized during this step in the process whenever feasible.

1. *Determination of "no potential to cause effects."* In certain instances, the nature, scope, location, and magnitude of the work and/or structures to be permitted may be such that it is reasonable to presume that there is no potential that a historic property exists or may be affected. Three such situations are:
 - (i) Areas that have been extensively modified by previous work. In such areas, historic properties that may have at one time existed within the RSA may be presumed to have been lost unless specific information indicates the presence of such a property. An example would be maintenance dredging of a previously constructed canal.
 - (ii) Areas which have been created in modern times. Some recently created areas, such as dredged material disposal islands, have had no human habitation. In such cases, it may be presumed that there is no potential for the existence of historic properties unless specific information indicates the presence of such properties.
 - (iii) Certain types of work or structures that are of such limited nature and scope that there is little likelihood of impinging upon a historic property even if such properties were to be present within the RSA. An example would be placement of a buoy or other aid to navigation.

Following review and documentation, a determination of *no potential to cause effects* the Corps has no further obligations under Section 106 or these procedures, except in the case of an inadvertent discovery.

e. If a “no potential to cause effects” determination cannot be made, the DE will coordinate/consult any other effects determinations as provided by the remaining parts of these procedures. Other effect determinations include no adverse affect and adverse affect.

5. Notifications and Participants

a. Standard Permits with a Public Notice

1. *Public Notice.* For Corps permits requiring a Public Notice, the public notice procedures at 33 CFR Part 325 will generally satisfy the requirement for public involvement and notification, provided identified consulting parties receive copies of public notices. The public notice should be sent to the SHPO/THPO, Indian tribes that may have land or ethnographic claims in the area of the proposed work, NHOs, certified local governments, and other consulting parties, as well as other interested parties (see 33 CFR 325.3(d)). In the case of large or controversial projects, the public notice should be provided to the Council.
2. *Public notice contents.* The DE's current knowledge of the presence or absence of historic properties and the effects of the proposed undertaking upon such properties, if present within the RSA, should be included in the public notice for standard permits. The public notice must accurately describe the undertaking's effects on historic properties and the knowledge of the types of historic properties, traditional cultural properties, or tribal resources potentially affected. A review of listed properties in the National Register of Historic Places is generally inadequate to accurately convey negative information for areas with no previous work, or in areas that have the potential to contain historic properties or tribal resources which may yet be identified. Appropriate sources of information to obtain information on historic properties include, but are not limited to: SHPO/THPO, Indian tribes, Hawaiian Native organizations, the internet, and contacts with local historical societies, museums, and universities. Coordinated determinations of effect with SHPO/THPO should be stated if known at the time the public notice is issued. Consultation with Indian tribes and NHOs is not satisfied by the public notice alone. DE's should consult with their resident and non-resident (removed) tribes or NHOs to agree upon a means by which notification of and subsequent consultation on a proposed undertaking should be accomplished.
3. *Authority to withhold from disclosure.* Locational and sensitive information related to archeological sites is excluded from the

Freedom of Information Act (Section 304 of the NHPA and Section 9 of Archeological Resources Protection Act). If the DE, SHPO, or THPO determines that the disclosure of information to the public relating to the location or character of sensitive historic resources may create a risk of harm, theft, or destruction to such resources or to the area or place where such resources are located, then the DE will not include such information in the public notice nor otherwise make it available to the public. The DE will furnish such information to the SHPO/THPO and the Council (if the Council is a consulting party) by separate notice. Sensitive information from Indian tribes and NHOs concerning traditional cultural properties, other historic properties, sacred sites, and Tribal trust resources may be transmitted orally to the DE. If the Indian tribe or Native Hawaiian organization requests that such information be held in confidence, that information will not be recorded or transmitted to other parties.

b. Letters of Permission. The processing of a Letter of Permission application should proceed as outlined in Section 3, Initial Review. If known, the applicant should provide information on potential impacts to historic properties or tribal concerns in the application. The DE should consult additional sources of information under 5(a)(2) with respect to the presence/absence of historic properties and tribal concerns within the RSA. If the DE identifies potential impacts or the presence of historic properties that may be effected as a result of the proposed undertaking, the Corps should notify the SHPO/THPO, in writing, as well as notify Indian tribes, and other consulting parties as required by these procedures.

c. General Permits

1. *General Permits with Pre-Construction Notification Requirements.* When a permit applicant notifies the Corps of a proposed undertaking in accordance with the Pre-construction Notification Procedures found at 33 CFR 330.1(e) or notification requirements associated with other types of General Permits, the Corps will follow the initial review process as defined in Section 4 of these procedures.

(i) If it is determined that the undertaking has no potential to cause effects on historic properties, the administrative record should be supplemented to document a basis for this determination and the section 106 process is complete.

(ii) If, during the initial review it is determined that a proposed undertaking may affect a historic property, the Corps should immediately inform the applicant that the verification will be suspended pending completion of the section 106 process following the procedures set forth in 33 CFR 330.5. In the case

of a Nationwide Permit, the DE may suspend the verification on any determination other than “no potential to cause effects” pending the results of further investigations necessary to establish whether a proposed undertaking has the potential to affect a historic property. For the purposes of these procedures, the section 106 process is considered to be complete once the DE has determined, through consultation with the SHPO/THPO, Indian tribes, NHOs, and other consulting parties, that an undertaking will not affect a historic property. A “no effect” determination may be achieved through permit conditions or an MOA. The SHPO/THPO will have 30 days to review the documentation and offer concurrence/non-concurrence with the effect determination. For any of the cases described in this sub-part, the verification cannot be granted and is considered suspended until the 106 process is complete.

(iii) Similarly, if the Corps determines that further investigations of a RSA are warranted in order to make a “no effect” determination, the Corps should follow the procedures set forth in Section 7 of these procedures. If investigations reveal that the proposed undertaking will have an effect on a historic property, the Corps will proceed with consultation as described in Section 5(d) of these procedures. If the results of an investigation indicate that no historic properties are present in the RSA, or if it is determined that the proposed undertaking will not have an effect on historic properties even if present within the RSA, this determination should be provided to the SHPO/THPO and other consulting parties along with documentation supporting the determination. The SHPO/THPO will have 30 days to review the documentation and offer concurrence/non-concurrence with the effect determination. For any of the cases described in this sub-part, the verification cannot be granted and is considered suspended until the 106 process is complete.

(iv) The DE may assert discretionary authority on Nationwide Permit verifications involving historic properties as provided under 33 CFR 330.4(e).

2. *General Permits without Pre-construction Notification Requirements*

. Under certain circumstances, activities are exempt from pre-construction notification to the Corps (see 33 CFR 330). As a condition of the NWP, No activity which may affect properties listed or properties eligible for listing in the National Register of Historic Places, is authorized until the DE has complied with the provisions of these procedures. If a prospective permittee is aware of the presence of historic properties within the RSA that may be effected as a result of a proposed undertaking, regardless

of whether pre-construction notification is required, the prospective permittee should notify the Corps of the potential to impact historic properties. Such notification initiates the pre-construction notification process as described at 33 CFR 330. The Corps should follow the procedures for consulting with the SHPO/THPO, and other consulting parties as described in Section 5(d) of these procedures. Failure on behalf of an applicant to notify the Corps as proscribed in this part constitutes a violation of the NWP and falls under Compliance Actions (33 CFR 326).

d. Informing consulting parties. During permit evaluation for historic properties that reasonably may be affected by the undertaking and that have been identified either by the DE or through the public interest review process, the DE will immediately inform the applicant, the SHPO/THPO, Indian tribes and NHOs that attach religious and cultural significance to those historic properties, the appropriate certified local government, and other consulting parties. The DE will provide those parties information concerning his or her current knowledge of the effects of the undertaking upon those properties. Those parties will have 30 days from the date of the notification to submit their comments.

e. Authority to withhold from disclosure. Locational and sensitive information related to archeological sites is excluded from the Freedom of Information Act (Section 304 of the NHPA and Section 9 of Archeological Resources Protection Act). If the DE or the Secretary of the Interior determines that the disclosure of information to the public relating to the location or character of sensitive historic resources may create a risk of harm, theft, or destruction to such resources or to the area or place where such resources are located, then the DE will not include such information in the public notice nor otherwise make it available to the public. The DE will furnish such information to the SHPO/THPO and the Council (if the Council is a consulting party) by separate notice. Sensitive information from Indian tribes and NHOs concerning traditional cultural properties, other historic properties, sacred sites, and Tribal trust resources may be transmitted orally to the DE. If the Indian tribe or Native Hawaiian organization requests that such information be held in confidence, that information will not be recorded or transmitted to other parties.

f. Determine Participants in the process:

1. The DE shall make a reasonable and good faith effort to identify any Indian tribes or NHOs, with current, historical, or aboriginal rights, that attach religious and cultural significance to historic properties in the RSA. The DE will seek their views (see Section 6), as consulting parties, on the undertaking, and will also consult with them on a government-to-government basis pursuant to the Federal trust responsibility.

2. *Consulting parties.* If the undertaking has the potential to affect historic properties eligible for inclusion in the NRHP, the DE will identify appropriate consulting parties for the section 106 consultation process:

(i) *State Historic Preservation Officer/Tribal Historic Preservation Officer.* The DE will identify the appropriate SHPO/THPO for consultation. If the undertaking occurs on tribal land, and there is a THPO who is participating in the section 106 consultation, the SHPO may participate as a consulting party if the undertaking affects historic properties located off tribal lands. If the owner of a property on tribal lands is not a member of the tribe, or the land is not held in trust by the Secretary of the Interior for the benefit of the tribe, the SHPO also participates as a consulting party if the property owner requests the SHPO's participation in the section 106 process. In addition, the SHPO can participate in section 106 consultations for undertakings that occur on tribal land, if the tribe makes a request to the SHPO and the DE agrees with the request.

(ii) *Indian tribes that have not assumed SHPO functions.* If the undertaking occurs on tribal land or affects tribal land, and the Indian tribe has not assumed SHPO responsibilities, the DE will consult with a representative designated by the Indian tribe, as well as the SHPO. These Indian tribes have the same rights of consultation and concurrence as Indian tribes with THPOs.

(iii) *Indian tribes and NHOs.* Indian tribes and/or NHOs that attach religious and cultural significance to historic properties that will be affected by an undertaking.

(iv) *Local governments.* Representatives of local governments that have jurisdiction over the area in which the effects of an undertaking may occur.

(v) *Permit applicants.* The applicant for the DA permit.

(vi) *Additional consulting parties.* Individuals and organizations with a demonstrated interest in the undertaking due to the nature of their legal or economic relationship to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties. The DE has the discretion to determine on a case-by-case basis whether such individuals and organizations will be consulting parties for the undertaking.

(viii) *Advisory Council on Historic Preservation.* The Council, when the Council determines that its involvement is necessary to ensure that the purposes of section 106 of the NHPA are met (see Section 9).

6. Government to Government Consultation with Federally-recognized Tribes

a. Government-to-government consultation requires meaningful communication between tribal governments and DEs. If a proposed activity may

affect historic properties, including traditional cultural properties, sacred sites or trust resources to which Indian tribes attach religious or cultural significance, the DE will contact the Indian tribe(s) in a manner appropriate to the particular tribe(s) for government-to-government consultation. The public notice distributed in accordance with the procedures at 33 CFR 325.3 is not the appropriate means to notify a Tribe of a permit action, nor to initiate consultation.

b. When an Indian Tribe has assumed the functions of the SHPO on tribal lands, the THPO is the official representative for the purposes of section 106. If an Indian Tribe has not assumed the responsibilities of the SHPO on tribal lands, the DE will consult with a representative designated by the Indian Tribe, in addition to consulting with the SHPO.

c. Consultation is required with any Indian Tribe that places historic and cultural significance on historic properties, including traditional cultural properties, trust resources, and sacred sites, even if these are located on private lands, and on lands formerly occupied by a tribe that has been relocated.

d. The meaning of government-to-government consultation extends beyond consultation under Section 106. The DE will seek to determine other Tribal issues – such as water quality or water supply and consult on these issues as well.

e. In recognition of a Federally-recognized Indian Tribe's status as a sovereign nation, formal government-to-government relations are established and maintained directly between DEs and the heads of Tribal governments. DEs initiate government-to-government relations with Federally-recognized Indian Tribes by means of formal, written communication to the heads of Tribal governments. DEs are encouraged to meet face-to-face with the heads of Tribal governments as a part of the consultation process. Any final decision that has been the subject of government-to-government consultation will be formally transmitted from the DE to the head of the Tribal Government. Once consultation is complete, the DE remains the final decision authority.

f. The DE and/or the head of a Tribal Government may designate technical staff to attend consultation meetings, track issues, and suggest potential solutions or outcomes. However, if consultative deliberations result in a formal letter stating policy, an MOA, a PA, or similar document, only the DE (or the Deputy DE) and the head of the Tribal government may sign it.

g. Guidance for consultation with American Indians and Alaska Natives (Federally recognized Tribes) is found in Policy Guidance Letter 57 and the 1998 Department of Defense American Indian and Alaska Native Policy.

7. Investigations

Avoidance and minimization. At the earliest practical time, the DE will discuss with the applicant measures or alternatives to avoid or minimize effects on historic properties. Avoidance is always the first and most effective measure to protect historic properties and to minimize the applicant's potential accountability for additional effects to historic properties.

a. Need for investigations. When initial review, additional submissions by the applicant, SHPO/THPO, tribal comments, or responses to the public notice indicate the known existence or reasonable potential existence of tribal resources or historic properties that may be eligible for inclusion in the National Register, the DE shall examine the pertinent evidence to determine the need for further investigations. Comments or information of a general nature will not be considered as sufficient evidence to warrant an investigation. The evidence must set forth specific reasons for the need to further investigate within the project review area and may consist of:

1. Specific information concerning properties, including traditional cultural properties, which may be eligible for inclusion in the National Register and which are known to exist in the vicinity of the project; and
2. Specific information concerning known sensitive areas which are likely to yield properties eligible for inclusion in the National Register, particularly where such sensitive area determinations are based upon data collected from other, similar areas within the general vicinity.

b. Investigations in the RSA. If the DE's review indicates that there is a reasonable expectation that the undertaking has the potential to affect properties in the RSA that may be eligible for inclusion in the National Register, the DE should conduct, (when feasible given resource constraints) or cause to be conducted, an investigation. The investigation shall be conducted in accordance with the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation, under the supervision of an individual who meets the professional qualification standards in those standards and guidelines. The DE can require the applicant to furnish information necessary for the DE to determine whether the property meets the eligibility criteria.

c. Additional investigations. In addition to any investigations conducted in accordance with paragraph (b), the DE may conduct or cause to be conducted additional investigations which the DE determines are essential to reach the public interest decision. The Corps will notify the SHPO/THPO if any evidence is found which indicates the presence of properties that may be eligible for inclusion in the National Register.

d. Types of investigation. As determined by the DE, investigations may consist of any of the following: further consultations with the SHPO/THPO, the State Archeologist, local governments, Indian tribes, NHOs, local historical and archeological societies, university archeologists, and others with knowledge and expertise in the identification of historical, archeological, cultural and scientific resources; field examinations; and archeological testing. In most cases, the DE will require, in accordance with 33 CFR 325.1(e), that the applicant conduct the investigation at his expense, and usually by third party contract.

e. Identification responsibilities. The Corps' responsibility to identify properties that may be eligible for inclusion in the National Register, and to make eligibility determinations for properties that may be eligible for inclusion in the National Register, is limited to resources located within the RSA. The Corps may be required to consider effects to historic properties adjacent to the RSA but is not responsible for identifying or assessing properties that may be eligible for inclusion in the National Register which are located outside the RSA.

f. Phased identification efforts. Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the DE may use a phased process to conduct investigations within the RSA. The DE may also defer final identification and evaluation of historic properties if it is specifically provided for in an MOA, a PA, or the record of decision for an environmental impact statement. Once effects are identified, the DE may also choose to condition the permit for phased compliance. This process should establish the likely presence of historic properties within the RSA for each alternative or inaccessible area through background research, consultation, and an appropriate level of field investigation, taking into account the number of alternatives under consideration, the magnitude of the undertaking and its likely effects, the RSA, and the views of the SHPO/THPO and any other consulting parties. As specific aspects or locations of an alternative are refined or access is gained, the DE will proceed with the identification and evaluation of historic properties within the appropriate area(s) of potential effects.

g. Investigative Process. The investigative process is determined by the types of resources requiring identification and generally follows three phases:

- (i) Phase I identifies the type of resources present in the RSA and can be partially acquired from sources listed in 5(a)2 and on-site work
- (ii) Phase II provides information on the eligibility of potentially eligible historic properties identified during Phase I.
- (iii) Phase III is treatment and mitigation of adverse effects to properties eligible for inclusion in the NRHP. These effects and measures to mitigate and treat them are normally codified in an MOA.

Note: All work under identification should be reviewed by Corps personnel with expertise whenever feasible. The DE may seek the views of the SHPO/THPO when reviewing the results of historic properties' investigations.

h. Voluntary investigations. The DE cannot require the permit applicant to conduct investigations outside of the RSA, but a permit applicant can conduct such investigations as a voluntary measure. The DE will clearly indicate to the permit applicant which investigations are required for section 106 compliance.

8. Eligibility Determinations and National Register Criteria

a. Eligibility determinations. DEs will make eligibility determinations only for those properties within the RSA. If the DE determines that the undertaking has no potential to cause effects to historic properties, the section 106 process is complete with proper documentation of the decision.

b. Apply National Register criteria. When determining whether a property may be eligible for inclusion in the National Register of Historic Places, the DE will consult with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to the property in question. The DE will apply the National Register criteria found at 36 CFR 60.4 to make eligibility determinations. The DE will provide the SHPO/THPO and Indian tribes or NHOs 30 days to respond to eligibility determinations.

c. Determine whether a property is eligible. If the DE determines any of the National Register criteria are met, and the SHPO/THPO agree, the property shall be considered eligible for the National Register for section 106 purposes. If the DE determines the criteria are not met and the SHPO/THPO agrees, the property shall be considered not eligible and the section 106 process is considered to be complete. If the DE and the SHPO/THPO do not agree, or if the Council or the Secretary of the Interior so request, the DE shall obtain a determination of eligibility from the Secretary (Keeper of the National Register) pursuant to 36 CFR part 63. If an Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to a property off tribal lands does not agree, then the Indian tribe or Native Hawaiian organization may ask the Council to request the DE to obtain an eligibility determination from the Secretary of the Interior (Keeper of the National Register).

9. Assessing Effects

a. The DE is responsible for evaluating the effects the undertaking will have on historic properties included in, or determined eligible for inclusion in, the National Register, after soliciting views from consulting parties. Effects may be direct or indirect. A direct effect is caused by the undertaking and occurs at the same time and place. Examples of direct effects include demolition, excavation, grading, and other forms of ground disturbance. An indirect effect is also caused

by the undertaking, but occurs later in time or is farther removed in distance, and is still reasonably foreseeable. DEs will also consider indirect effects resulting from the undertaking to historic properties listed in the National Register or previously determined eligible for listing in the National Register, which are located within the RSA, but outside the applicant's property. Examples of indirect effects include visual and noise impacts resulting from the undertaking authorized by the Corps permit.

b. No Historic Properties present. If the DE finds that there are no historic properties present, or there are historic properties present but the undertaking will have no adverse effect on those historic properties (e.g., adverse affects have been mitigated), the DE will provide documentation of this finding, (see Section 17) to the SHPO/THPO, as well as any other consulting parties.

1. If the SHPO/THPO or the Council, only if the Council has entered into the section 106 consultation process, do not object to the finding within 30 days from date of notification, the consultation process ends and the DE may proceed with the permit decision.
2. If the SHPO/THPO objects with the DE's adequately documented "no effect" determination within the 30-day review period, the DE may either consult with the SHPO/THPO to resolve the disagreement, or request an opinion from the Council pursuant to paragraph (d) of this section.

c. No Adverse Effect. If the DE, based on his coordination with the SHPO/THPO and other consulting parties, determines that an effect is not adverse, the DE will provide documentation of this finding, (see Section 17) to the SHPO/THPO, as well as other consulting parties.

1. Unless the Council is reviewing the "no adverse effect" determination pursuant to paragraph (d) of this section, the DE may proceed after the close of the 30-day review period if the SHPO/THPO has agreed with the determination or has not provided a response, and no consulting party has objected.
2. If the SHPO/THPO or any consulting party notifies the DE in writing within the 30-day review period objecting to the determination and specifies the reasons for the disagreement in the notification, the DE will either consult with the party to resolve the disagreement, or request an opinion from the Council pursuant to paragraph (d) of this section.
3. The agency official should seek the concurrence of any Indian tribe or Native Hawaiian organization that has made known to the

agency official that it attaches religious and cultural significance to a historic property subject to the finding. If such Indian tribe or Native Hawaiian organization disagrees with the finding, it may within the 30-day review period, specify the reasons for disagreeing with the finding and request the Council to review and object to the finding pursuant to paragraph (d) of this section.

d. Special conditions. If special conditions must be placed on the permit in order to reach a "no adverse effect" determination, provided that the SHPO/THPO and other consulting parties agree that to condition the permit would result in a "no adverse effect", the special condition must be enforceable, directly related to the section 106 work to be undertaken, and justified in the administrative record for the permit action.

1. Disagreement with findings. If there are disagreements with the district engineer's "no historic properties affected" or "no adverse effect" findings as discussed in paragraphs b(2) and c(2) and (3) above, the DE may either continue consultation to resolve the disagreement or request an opinion from the Council.
2. If the DE requests an opinion from the Council, he will forward the finding and supporting documentation (see Section 17), and request that the Council review the finding pursuant to paragraph (2), below. The DE will notify the other consulting parties and make the documentation available to the public.
3. The Council has up to 30 days from the date of notification to review the determination and provide either the DE or the Office of the Assistant Secretary of the Army (Civil Works) (OASA (CW)) with its opinion regarding the finding. If the Council does not respond within 30 days from the date of notification, the DE may consider the section 106 responsibilities fulfilled and proceed with the permit process.
4. The DE or the OASA (CW) will take into account the Council's opinion before reaching a final decision on the permit. The DE must document his final decision in the administrative record for the permit action, including the rationale for the final decision and how the Council's opinion was considered. If the Council provides its opinion to the OASA (CW), the Headquarters Regulatory Community of Practice in Washington, DC (HQ Regulatory CoP) and the district will assist the OASA (CW) in preparing the required documentation for the final decision. The HQ Regulatory CoP will endeavor to provide guidance, if necessary, to the DE within 30 days of OASA (CW)'s receipt of the Council's opinion. If the DE's initial finding will be revised, the DE will proceed in accordance with

the revised finding. If the DE's (or the OASA (CW)'s) final decision is to affirm initial finding of "no historic properties affected" or "no adverse effect", once the summary decision has been sent to the Council, the SHPO/THPO, and the consulting parties, the Corps responsibilities under section 106 are fulfilled.

5. Adverse Effect. In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified historic properties, the DE shall apply the criteria of adverse effect to historic properties within the project review area. The DE shall consider any views concerning such effects which have been provided by consulting parties and the public. If an adverse effect is found, the DE will consult further to resolve the adverse effect pursuant to Section 10(b), Resolution of Adverse Effects.
 1. *Criteria of adverse effect.* An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register.
 2. *Examples of Adverse Effects.* Adverse effects on historic properties include, but are not limited to:
 - (i) Physical destruction of or damage to all or part of the property;
 - (ii) Alteration of a property, including restoration, rehabilitation, repair, maintenance, stabilization, hazardous material remediation, and provision of handicapped access, that is not consistent with the Secretary of the Interior's Standards for the Treatment of Historic Properties (36 CFR part 68) and applicable guidelines;
 - (iii) Removal of the property from its historic location;
 - (iv) Change of the character of the property's use or of physical features within the property's setting that contribute to its historic significance;
 - (v) Introduction of visual, atmospheric, or audible elements that diminish the integrity of the property's significant historic features; and
 - (vi) Neglect of a property which causes its deterioration, except where such neglect and deterioration are recognized qualities of a property of religious and cultural

significance to an Indian tribe or Native Hawaiian organization

3. *Phased application of criteria.* Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a phased process in applying the criteria of adverse effect consistent with phased identification and evaluation efforts conducted pursuant to section 7 of these procedures.
4. *No adverse effect.* Effects of an undertaking that would otherwise be found to be adverse may be considered as being not adverse for the purpose of these procedures, provided the SHPO/THPO concurs and implementation is through permit conditions:
 - (i) When the historic property is of value only for its potential contribution to archeological, historical, or architectural research, and when such value can be substantially preserved through the conduct of appropriate research, and such research is conducted in accordance with applicable professional standards and guidelines; or
 - (ii) When the undertaking is limited to the rehabilitation of buildings and structures and is conducted in a manner that preserves the historical and architectural value of affected historic properties through conformance with the Secretary of the Interior's Standards for the Treatment of Historic Properties (36 CFR part 68) and other applicable guidelines, to avoid adverse effects.

10. DE Decision

a. *Decision criteria and mitigation.* At any time during permit processing, the DE may consult with the consulting parties to discuss and consider possible alternatives or measures to avoid or minimize the adverse effects of a proposed undertaking on historic properties. In making the public interest decision on a permit application in accordance with 33 CFR 320.4, the DE shall weigh all factors, including the effects of the undertaking on historic properties and any comments of the Council, the SHPO/THPO, Indian tribes, NHOs, and other consulting parties, and any views of the public or other interested parties. The DE will add permit conditions to avoid or minimize effects on historic properties which he determines are necessary in accordance with 33 CFR 325.4. In reaching his determination, the DE will consider the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation.

b. Resolution of adverse effects.

1. If the consultation results in a mutual agreement between DE and the SHPO/THPO, permit applicant, other consulting parties, and the Council (if the Council is a consulting party) regarding the resolution of adverse effects to historic properties, then the DE may formalize that agreement through either an MOA or permit conditions determined to be necessary in accordance with 33 CFR 325.4. The MOA will be signed by the DE, the SHPO/THPO, the Council (if the Council was involved in the resolution of adverse effects), the permit applicant, and invited signatories, such as Indian tribes and NHOs. The signatures of tribal representatives are required when MOAs address activities on tribal lands. If the DE and SHPO/THPO cannot agree upon the terms of an MOA, the DE will request the participation of the Council in the consultation. The Council is required to respond within 45 days, but may request a time extension from the DE. When a copy of an MOA is sent to the Council, the DE will include the documentation listed in Section 17 of these procedures.
2. The terms of an MOA should be incorporated as permit conditions, to ensure compliance with the NHPA. A copy of the MOA will be sent to each consulting party. If the DE intends to use conditions in the DA permit to address the treatment of historic properties instead of executing an MOA, the DE should notify the SHPO/THPO and the Council (if the Council is a consulting party) and provide them with a copy of the proposed condition prior to finalizing the permit decision.

11. Failure to Resolve Effects

a. Termination of Consultation. After consulting to resolve adverse effects, the DE, the SHPO/THPO, or the Council may determine that further consultation will not be productive and terminate consultation. Any party that terminates consultation will notify the other consulting parties, and provide, in writing, the reasons for terminating consultation.

b. DE termination. If the DE terminates consultation, the Office of the Assistant Secretary of the Army (Civil Works) (OASA(CW)) will request the Council's comments, and notify the consulting parties of that request. The Council will provide comments on the undertaking as described in paragraph (f) of this section. Upon receipt of the Council's comments, the OASA(CW) will take into account those comments when making a decision on the undertaking's effects on historic properties. Documentation for this decision will be made in writing by the OASA(CW), and will include the rationale for decision and evidence that the Council's comments were considered. The documentation will

be provided to the Council before a final decision on the undertaking is made. The documentation will be made part of the administrative record for the individual permit application, nationwide permit pre-construction notification, or general permit verification request.

c. SHPO termination. If a SHPO terminates consultation, the district engineer and the Council may execute an MOA or agree to use permit conditions to resolve adverse effects without the SHPO's involvement.

d. THPO termination. If a THPO terminates consultation regarding an undertaking occurring on, or affecting, historic properties on its tribal lands, the DE should request the Council to comment on the undertaking as described in paragraph (f) of this section.

e. Council termination. If the Council terminates consultation, the Council will notify the DE, the Corps of Engineer's Federal Preservation Officer (FPO), and all consulting parties of the termination. The Council will provide comments on the undertaking in accordance with paragraph (f) of this section. The Council may consult with the Corps of Engineer's FPO before terminating consultation to resolve issues concerning the undertaking and its effects on historic properties.

f. Comments by the Council. If consultation is terminated in accordance with paragraphs (b), (d), or (e) of this section, the Council will provide opportunities for the DE and all consulting parties to submit comments concerning the undertaking to the Council. If requested by the Council, the DE will provide additional information, arrange an on-site inspection, and provide additional opportunity for public participation.

1. The Council will provide its comments to the OASA(CW) within 45 days of receipt of the request for the Council's comments. Copies of the Council comments will be provided to the DE, the applicant, the Corps of Engineer's FPO, and all consulting parties. If the Council does not provide its comments to the OASA(CW) within 45 days of receipt of the request for review, the DE may proceed with processing the permit application.
2. The OASA(CW) shall take into account the Council's comments in reaching a final decision on the undertaking. Section 110(I) of the act directs that the head of the agency shall document this decision and may not delegate his or her responsibilities pursuant to section 106. Documenting the agency head's decision shall include:
 - (i) Preparing a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's comments and providing it to the Council prior to approval of the undertaking;

- (ii) Providing a copy of the summary to all consulting parties;
and
- (iii) Notifying the public and making the record available for public inspection.

12. Compliance and Enforcement

a. Historic properties impacts. Routine compliance and enforcement reviews under 33CFR326.4(a) will ensure conditions for historic properties have been met, as well as ensure no impacts to historic properties or tribal resources have occurred as a result of the permit action.

1. The applicant, SHPO or THPO should be contacted under 33 CFR 326.3(c) when violation of a permit condition has occurred or a previously unidentified historic property has been impacted.
2. If the DE determines corrective measures are available, in consultation with the SHPO or THPO he shall proceed with Sections 7-9 of these procedures to address the effected historic property.

13. Historic Properties Discovered During Construction

a. Discovery of previously unknown historic properties. If, after a permit has been issued, the DE finds or is notified that the permit area contains a previously unknown property that may be eligible for inclusion in the National Register which he reasonably expects to be affected by the undertaking, he will immediately notify the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to the property. The DE will first seek the permittee's voluntary avoidance of construction activities that could affect the property. If the permittee fails to avoid the property, the DE will determine if it is necessary to revoke or suspend the permit to protect the property until the section 106 consultation process is complete. Based on the circumstances of the discovery, equity to all parties, and considerations of the public interest, the DE may modify, suspend or revoke the permit in accordance with 33 CFR 325.7.

b. Resolution of adverse effects. If the DE, the SHPO/THPO, permit applicant, and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to the property do not reach an agreement pursuant to paragraph [11], the DE will determine the actions that can be taken to resolve adverse effects. The DE may modify, suspend or revoke the permit in accordance with 33 CFR 325.7 (or 33 CFR 330.4(e) and 330.5(d) for activities authorized by nationwide permits), after considering the circumstances of the discovery, equity to all parties, and the public interest. In addition, the DE will notify the SHPO/THPO, any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to the affected property, and the

Council within 48 hours of discovery, or at the soonest possible time. The notification will include the DE's assessment of the National Register eligibility of the property and proposed actions to resolve adverse effects. The SHPO/THPO, Indian tribe or Native Hawaiian organization, and the Council shall respond within 48 hours of the notification. The DE will take into account their recommendations, and then carry out the appropriate actions. The DE will provide the SHPO/THPO, Indian tribe or Native Hawaiian organization, and the Council a report of the actions taken when they are completed.

c. Use of memorandum of agreement or special permit conditions. If the DE determines that historic properties are likely to be discovered within the permit area during construction, the MOA or permit conditions should include a process to resolve any adverse effects to such properties. This process may include monitoring during construction and appropriate reporting and treatment if historic properties are encountered. Actions taken in accordance with the process in the MOA or permit conditions will satisfy the DE's responsibilities under section 106 of the NHPA and this guidance.

14. Emergency Procedures

Division engineers are authorized to approve special processing procedures in emergency situations. An "emergency" is a situation which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if corrective action requiring a permit is not undertaken within a time period less than the normal time needed to process the application under standard procedures. In emergency situations, the DE will explain the circumstances and recommend special procedures to the division engineer who will instruct the DE as to further processing of the application. Even in an emergency situation, reasonable efforts will be made to receive comments from interested Federal state, and local agencies and the affected public. Also, notice of any special procedures authorized and their rationale is to be appropriately published as soon as practicable. The emergency procedure shall apply in lieu of 800.3 through 800.6, and be used when an emergency undertaking is an essential and immediate response, as determined by the DE, for a disaster or emergency declared by the President, a tribal government, or the Governor of a State or if there is an imminent threat to life, property, human health, or human safety. This procedure applies to undertakings that are implemented either 45 days in advance of an imminent emergency or disaster situation or within 45 days after the emergency or disaster has been declared. DEs are encouraged to develop specific local procedures with THPOs and SHPOs.

15. Intentional Adverse Effects by Permit Applicants

a. General requirements. The DE shall not issue a permit to an applicant who, with the intent to avoid the requirements of section 106 of the NHPA, has

intentionally significantly adversely affected a historic property related to the undertaking, unless the DE determines, after consultation with the Council that the circumstances of the undertaking warrant issuance of the permit. This does not apply to intentional adverse effects to historic properties that are determined by the DE to be outside of the RSA for the undertaking.

b. Evaluation requirements. For an undertaking where the DE determines that paragraph 18 (a) is applicable, and circumstances may warrant the issuance of the permit, the DE will notify the Council. This notification will include sufficient documentation to explain the circumstances of the adverse effects to historic properties, the degree of damage to the integrity of the historic property, and why permit issuance is warranted. The documentation will include the views of the applicant, the SHPO/THPO, the Indian tribe if the undertaking occurs on or affects historic properties on tribal lands, Indian tribes or NHOs that attach religious or cultural significance to the historic property, and other parties known to be interested in the undertaking. The Council has 30 days from the date of the notification and documentation to provide its advisory opinion to the DE, or the DE may proceed with the permit decision.

c. DE's decision. If, after considering the Council's advisory opinion, the DE decides to issue the permit, the DE will notify the Council, SHPO/THPO, consulting parties, and other interested parties prior to issuing the permit to the applicant.

16. Programmatic Agreements

a. Use of PAs. To resolve adverse effects that may result from complex project situations or multiple undertakings, the DE, the SHPO, Council, and other Federal agencies may negotiate PAs. Such PAs may be used when effects on historic properties are similar and repetitive, involve more than one state, or are regional in scope. PAs may also be used when effects on historic properties cannot be fully determined prior to the approval of an undertaking.

b. Consulting parties. Consulting parties for PAs will include, as appropriate, SHPOs/THPOs, the National Conference of State Historic Preservation Officers (NCSHPO), Indian tribes, NHOs, other Federal agencies, the permit applicant, and members of the public likely to be interested in the PA.

c. Government to Government Consultation. Whenever a DE proposes a PA pursuant this section, the DE shall ensure that development of the PA includes appropriate government-to-government consultation with affected Indian tribes and consultation with affected NHOs. If any undertaking covered by a proposed PA has the potential to affect historic properties on tribal lands, the DE shall identify and consult with the Indian tribes having jurisdiction over such lands. If a proposed PA has the potential to affect

historic properties of religious and cultural significance to an Indian tribe or a Native Hawaiian organization which are located off tribal lands, the DE shall identify those Indian tribes and NHOs that might attach religious and cultural significance to such properties and consult with them.

d. Consultation process. The consultation process for programmatic agreements will follow the procedures in this guidance. If the consulting parties fail to reach agreement on a PA, the DE will conduct section 106 consultation on a case-by-case basis, as appropriate.

e. District Implementation Protocol. DEs are encouraged to develop District Implementation Protocols with their SHPO/THPOs to streamline implementation of these procedures and provide for expedited reviews and/or additional exempt activities. Prototype District Implementation Protocols may be used for the same type of undertakings in more than one case or across district boundaries. When the DE uses a prototype District Implementation Protocols, the DE may develop and execute the agreement without need for Council participation in consultation or Council's signature.

17. Treatment of Human Remains

a. Authority. Treatment, disposition, repatriation and curation of human remains recovered during historic properties work is a sensitive issue. The Federal law, Native American Graves Protection and Repatriation Act (NAGPRA), does not apply to permit actions unless they are on tribal or Federal lands. If human remains and associated funerary objects are encountered during work under a Corps permit, the Corps should defer to the SHPO/THPO and state unmarked burial laws concerning proper notification, treatment, and disposition. In cases of contested tribal claims or controversial actions triggered by the discovery of human remains, the ACHP should be notified.

1. As lead Federal agency, it may be necessary to mirror the general NAGPRA process to determine proper treatment and disposition of human remains. The goals of NAGPRA may be met this way while understanding the law does not apply to private land.
2. In states that lack specific legislation to address the discovery of unmarked burials, deference to the results of consultation between the SHPO, THPO, and recognized tribes should be given in cases of claims of human remains.
3. In the case of competing tribal claims, the Corps may require the applicant to undertake additional research, additional work, or provide additional information necessary to resolve the claim. In consultation with the applicant, consulting parties, SHPOs, THPOs, tribes and recognized tribes, the DE will issue a final decision under

(10) in this document.

b. *Treatment.* Proper treatment of information, disposition of human remains is important. Public notices will not generally discuss the presence of human remains unless the SHPO and the tribe agree with the language in advance. Photographs of human remains should never be used in public documents or released under FOIA requests. The Corps should instruct the applicant to work closely with the SHPO, THPO, and tribes to correctly treat human remains at all times, including encouraging proper curation for remains that are not repatriated.

18. Documentation Standards

a. *Adequacy of documentation.* The DE shall ensure that a determination, finding, or agreement under these procedures is supported by sufficient documentation to enable any reviewing parties to understand its basis. The DE shall provide such documentation to the extent permitted by law and within available funds. When the DE is conducting phased identification or evaluation under these procedures, the documentation standards regarding description of historic properties may be applied flexibly. If the Council, or the SHPO/THPO when the Council is not involved, determines the applicable documentation standards are not met, the Council or the SHPO/THPO, as appropriate, shall notify the DE and specify the information needed to meet the standard. At the request of the DE or any of the consulting parties, the Council shall review any disputes over whether documentation standards are met and provide its views to the agency official and the consulting parties.

b. *Format.* The DE may use documentation prepared to comply with other laws to fulfill the requirements of the procedures in this subpart, if that documentation meets the standards of this section.

c. *Finding of no historic properties affected.* Documentation shall include:

- 1) A description of the undertaking, specifying the Federal involvement, and its project review area, including photographs, maps, drawings, as necessary;
- 2) A description of the steps taken to identify historic properties.
- 3) The basis for determining that no historic properties are present or affected.

d. *Finding of no adverse effect or adverse effect.* Documentation shall include:

- 1) A description of the undertaking, specifying the project review area, including photographs, maps, and drawings, as necessary;
- 2) A description of the steps taken to identify historic properties;

- 3) A description of the affected historic properties, including information on the characteristics that qualify them for the National Register;
- 4) A description of the undertaking's effects on historic properties;
- 5) An explanation of why the criteria of adverse effect were found applicable or inapplicable, including any conditions or future actions to avoid, minimize or mitigate adverse effects; and
- 6) Copies or summaries of any views provided by consulting parties and the public.

e. MOA. When an MOA is filed with the Council, the documentation shall include an evaluation of any measures considered to avoid or minimize the undertaking's adverse effects and a summary of the views of consulting parties and the public.

f. Requests for comment without an MOA.
Documentation shall include:

- 1) A description and evaluation of any alternatives or mitigation measures that the agency official proposes to resolve the undertaking's adverse effects;
- 2) A description of any reasonable alternatives or mitigation measures that were considered but not chosen, and the reasons for their rejection;
- 3) Copies or summaries of any views submitted to the agency official concerning the adverse effects of the undertaking on historic properties and alternatives to reduce or avoid those effects; and
- 4) Any substantive revisions or additions to the documentation provided the Council.

19. Curation {THIS SECTION IS UNDER DEVELOPMENT}

CONCEPT DRAFT